

³ The Board notes that, following the September 17, 2019 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability, commencing October 22, 2015, causally related to her accepted March 13, 2013 employment injury.

FACTUAL HISTORY

On March 14, 2013 appellant, then a 54-year-old dispatch/window clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2013 she sustained an injury when her foot became stuck between two floor mats and she fell to the floor, landing on her right shoulder while in the performance of duty. She did not stop work at that time. OWCP accepted appellant's claim for right shoulder contusion, right shoulder/upper arm sprain, lumbar sprain, neck sprain, and concussion without loss of consciousness. Appellant stopped work for intermittent periods, commencing November 6, 2013, and OWCP paid her wage-loss compensation on the supplemental rolls commencing that date.

On January 28, 2014 appellant began working in a modified-duty position, which involved working in a passport office and required sitting for eight hours per day, engaging in simple grasping for eight hours, and standing/walking as necessary for minimal periods. The physical duties of the position were based on work restrictions provided on January 22, 2014 by Dr. Hrair Darakjian, a Board-certified orthopedic surgeon, who indicated that appellant was restricted from lifting more than 10 pounds, performing overhead work, and engaging in prolonged neck flexion.

In an October 21, 2015 report, Dr. Daniel A. Capen, an attending Board-certified orthopedic surgeon, noted that on physical examination appellant exhibited a markedly positive head compression sign, positive Spurling's maneuver to the right, and pain on right scapular retraction. He diagnosed cervical sprain/strain syndrome, right shoulder impingement with shoulder spurs and rotator cuff tendinopathy, spinal sprain/strain syndrome, knee contusion, and likely disc herniation syndrome.

A November 10, 2015 SF-50 indicated that appellant retired from the employing establishment on disability retirement, effective October 22, 2015. Appellant submitted additional progress reports from Dr. Capen dated December 2, 2015 and January 6, 2016. In a January 21, 2016 report of termination of disability and/or payment (Form CA-3), appellant's supervisor noted, "Please see attached job offer -- [eight] hours of work was available." She advised that appellant retired on disability retirement on October 22, 2015 and indicated, "Accommodated employee, [eight] hours of work within her restrictions." Attached was the job offer for the limited-duty position at a passport office in which appellant began working on January 28, 2014.

Appellant submitted progress reports from Dr. Capen dated February 3, March 2, April 6, June 1, July 6, August 24, and October 19, 2016. Dr. Capen began to recommend that appellant undergo right shoulder surgery, including subacromial decompression with acromioclavicular decompression, and possible right rotator cuff repair. In his February 3, 2016 report, he indicated that appellant remained disabled.

On September 22, 2016 OWCP referred appellant for a second opinion examination to Dr. Steven W. Pearson, a Board-certified orthopedic surgeon. It requested that he evaluate whether appellant had disability causally related to her accepted March 13, 2013 employment injury. In a November 9, 2016 report, Dr. Pearson diagnosed severe spondylosis with degenerative disc disease, cystic bony changes, and facet arthrosis at C3-6; right shoulder impingement, possible right rotator cuff tear, and right acromioclavicular joint arthropathy and lumbar strain with disc disease. He found that these conditions were “medically connected” to the accepted March 13, 2013 employment injury and that appellant needed right shoulder surgery due to the effects of that injury.⁴ In a December 13, 2016 supplemental report, Dr. Pearson clarified that appellant’s cervical and lumbar spine conditions were directly caused by the March 13, 2013 injury and that her right shoulder conditions were directly caused by that injury.

By decision dated January 18, 2017, OWCP expanded the accepted conditions to include right shoulder impingement syndrome and cervical disc disorder with radiculopathy, mid-cervical region.

Appellant submitted progress reports from Dr. Capen dated January 11, 2017 to March 7, 2018, as well as a February 28, 2017 magnetic resonance imaging (MRI) scan of the lumbar spine, March 20, 2017 and March 30, 2018 MRI scans of the cervical spine, and April 17, 2018 MRI scans of both knees. On April 5, 2017 Dr. Capen provided the additional diagnosis of right shoulder impingement with acromioclavicular arthropathy and on March 7, 2018 he provided the additional diagnoses of knee internal derangement, likely degenerative arthritis, lumbago, cervical discopathy, and significant irritability with lumbago-like symptomatology.

On April 13, 2018 appellant filed a claim for compensation (Form CA-7) for wage-loss compensation, claiming disability from work for the period October 22, 2015 through April 14, 2018.⁵ On the employing establishment’s portion of the Form CA-7 a personnel specialist provided a May 4, 2018 notation, indicating that appellant was a former employee “no longer on rolls,” effective November 2, 2015, and that she had retired on disability retirement, effective the same date. The specialist noted that “work was available for [eight hours] a day.” Appellant submitted a May 2, 2018 progress report from Dr. Capen who indicated, under the heading “disability status,” that she “is permanent and stationary.”

In a May 15, 2018 letter, OWCP requested that the employing establishment indicate whether it would have been able to accommodate appellant in full-time work under Dr. Pearson’s work restrictions if she had not retired on October 22, 2015. In a May 16, 2018 letter, the employing establishment indicated that reference should be made to “enclosed information

⁴ In his November 9, 2016 report, Dr. Pearson noted that the restrictions in an attached work capacity evaluation (Form OWCP-5c) constituted appellant’s restrictions based on the aggravation of her preexisting conditions by the March 13, 2013 employment injury. In a November 15, 2016 OWCP-5c form, he indicated that appellant was restricted from sitting more than six hours per day, walking/standing more than four hours, lifting more than 20 pounds, or pushing/pulling more than 30 pounds.

⁵ Appellant later indicated that she stopped work in June 2014, but she only claimed wage-loss compensation for disability commencing October 22, 2015.

regarding full-time modified duty.” OWCP attached a copy of the modified-duty position in which appellant began working on January 28, 2014.

In a May 17, 2018 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her recurrence of disability claim. It afforded her 30 days to respond.⁶

In a May 25, 2018 letter, counsel argued that appellant sustained a recurrence of disability on October 22, 2015, because there was no clear, written evidence in the case record that work was available to her at that time, which accommodated her work restrictions necessitated by the accepted March 13, 2013 employment injury. Appellant submitted an April 4, 2018 progress report from Dr. Capen.

By decision June 19, 2018, OWCP denied appellant’s claim, finding that she had not submitted sufficient medical evidence to establish a recurrence of disability on or after October 22, 2015 causally related to her accepted March 13, 2013 employment injury. It also noted, “[i]n addition, your employing agency notified this office that full-time modified work was available, and would have continued to be available had [appellant] not elected disability retirement.”

On June 19, 2019 appellant, through counsel, requested reconsideration of the June 19, 2018 decision. Counsel continued to argue that on October 22, 2015 work was not available to appellant, which accommodated her work restrictions necessitated by the accepted March 13, 2013 employment injury. Appellant submitted an Office of Personnel Management (OPM) form for agency certification of reassignment and accommodation efforts (Form 3112D), signed by an employing establishment official on July 27, 2015. In the portion of the form requesting information about whether a reasonable effort for accommodation had been made, the official checked a box indicating, “Yes, describe below accommodation efforts made, attach supporting documentation, and provide narrative analysis of any unsuccessful accommodation efforts.” The official added the notation, “If any confusion, please see supervisor’s statement (SF 3112B).” In the portion of form requesting information about the results of the agency’s reassignment efforts, the official checked a box indicating, “Reassignment is not possible. There are no vacant positions at this agency, at the same grade or pay level and tenure within the same commuting area for which the employee meets minimum qualifications standards.”⁷

In a June 19, 2019 statement, appellant asserted that she stopped work in June 2014 and alleged that on October 22, 2015 no work was available to her, which was within her work restrictions. She also submitted progress reports from Dr. Capen dated between June 13, 2018 and August 7, 2019. In his June 13, 2018 report, Dr. Capen indicated that appellant remained disabled.

By decision dated September 17, 2019, OWCP denied modification of its June 19, 2018 decision. It found that appellant had not established that the employing establishment did not have

⁶ OWCP also developed the issue of whether appellant’s request for right shoulder surgery should be authorized. On March 14, 2019 it advised appellant in an informational letter that it could not authorize her request for right shoulder surgery. The issue of surgery authorization is not currently before the Board.

⁷ The official also checked a box indicating that appellant was occupying a permanent position.

work available to her on October 22, 2015, which was within the restrictions necessitated by her accepted March 13, 2013 employment injury.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁸ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations.⁹ A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction in force.¹⁰ OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.¹¹

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹² Where no such rationale is present, the medical evidence is of diminished probative value.¹³

ANALYSIS

The Board finds that this case is not in posture for decision.

The Board finds that the evidence of record is ambiguous with respect to whether the employing establishment had work available to appellant on October 22, 2015, which was within the work restrictions necessitated by her accepted March 13, 2013 employment injury. As noted above, a recurrence of disability may be found when a light-duty assignment made specifically to

⁸ 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹² *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

¹³ *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations.¹⁴

The case record contains a January 21, 2016 Form CA-3 in which appellant's supervisor noted, "[p]lease see attached job offer -- [eight] hours of work was available." She advised that appellant retired on disability retirement on October 22, 2015 and indicated, "[a]ccommodated employee, [eight] hours of work within her restrictions." Attached was the job offer for the limited-duty position at a passport office in which appellant began working on January 28, 2014.¹⁵

The Board notes, however, that it is unclear how the presentation of a job offer document from January 28, 2014 demonstrates that an actual position accommodating appellant's contemporaneous work restrictions due to the March 13, 2013 employment injury was in fact available to appellant on or about October 22, 2015, *i.e.*, the date that she claimed she sustained a recurrence of disability. In addition, the case record contains other evidence, which creates further ambiguity regarding whether work appropriate for appellant's injury-related work restrictions was available on or about October 22, 2015. Appellant submitted an OPM form for agency certification of reassignment and accommodation efforts (Form 3112D), signed by an employing establishment official on July 27, 2015. In the portion of the form requesting information about whether a reasonable effort for accommodation had been made, the official checked a box indicating, "Yes, describe below accommodation efforts made, attach supporting documentation, and provide narrative analysis of any unsuccessful accommodation efforts." The official added the notation, "[i]f any confusion, please see supervisor's statement (SF 3112B)." However, the case record does not contain such a supervisor's statement or further description of any accommodation efforts undertaken. Moreover, in the portion of form requesting information about the results of the agency's reassignment efforts, the official checked a box indicating, "[r]eassignment is not possible. There are no vacant positions at this agency, at the same grade or pay level and tenure within the same commuting area for which the employee meets minimum qualifications standards."¹⁶

While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁷ For these reasons, in order to properly evaluate appellant's claim for an October 22, 2015 recurrence of disability caused by her accepted March 13, 2013 employment injury, it is necessary

¹⁴ See *supra* note 10.

¹⁵ In a May 16, 2018 letter, the employing establishment also referenced the January 28, 2014 job offer as evidence that appropriate work was available to appellant on October 22, 2015. In addition, on the Form CA-7 effectuating appellant's recurrence claim, a personnel specialist provided a May 4, 2018 notation indicating that appellant was a former employee "no longer on rolls," effective November 2, 2015, and that she had retired on disability retirement effective the same date. The specialist noted that "work was available for [eight hours] a day."

¹⁶ The official also checked a box indicating that appellant was occupying a permanent position, but the official did not provide any further description of the position.

¹⁷ See *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *L.L.*, Docket No. 12-194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

to remand the case to OWCP for further development of the matter of the availability of appropriate work. Therefore, the case shall be remanded to OWCP for further development of appellant's recurrence of disability claim to include evaluation of whether the employing establishment had work available to appellant on or about October 22, 2015, which was within the restrictions necessitated by her accepted March 13, 2013 employment injury. Following such further consideration and after such further development as it deems necessary, OWCP shall issue a *de novo* decision with respect to appellant's recurrence of disability claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision.

Issued: August 13, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board